

RESOLUTION NO.

Resolution of the Planning Commission of the City of San José approving a Planned Development Permit Amendment to use certain real property described herein for the purpose of allowing late night hours between 12:00 midnight and 3:00 a.m. on Thursdays, Fridays and Saturdays at an existing public eating establishment.

FILE NO. PDA87-072-01

WHEREAS, pursuant to the provisions of Chapter 20.100 of Title 20 of the San José Municipal Code, on October 8, 2003, an application (File No. PDA87-072-01) was filed for a Planned Development Permit Amendment for the purpose of allowing late night hours between 12:00 midnight and 3:00 a.m. on Thursdays, Fridays and Saturdays at an existing public eating establishment., on that certain real property (hereinafter referred to as "subject property"), situate in the A(PD) Planned Development Zoning District, located at at the southwest corner of Capitol Avenue and Sierra Grande Way, San José, and

WHEREAS, the subject property is all that real property described in Exhibit "A," which is attached hereto and made a part hereof by this reference as if fully set forth herein; and

WHEREAS, pursuant to and in accordance with Chapter 20.100 of Title 20 of the San José Municipal Code, this Planning Commission conducted a hearing on said application, notice of which was duly given; and

WHEREAS, pursuant to and in accordance with Chapter 20. 100 of Title 20 of the San Jose Municipal Code, the Director of Planning, Building and Code Enforcement conducted a hearing on said application; and

WHEREAS, on July 2, 2004, the Director of Planning, Building and Code Enforcement denied the application, from which decision the appellant has appealed to this Planning Commission; and

WHEREAS, at said hearing, this Planning Commission gave all persons full opportunity to be heard and to present evidence and testimony respecting said matter; and

WHEREAS, at said hearing this Planning Commission received and considered the reports and recommendation of the Director of Planning, Building and Code Enforcement; and

WHEREAS, at said hearing, this Planning Commission received in evidence a development plan for the subject property entitled, "Capitol Commercial Center," dated June 30, 2004. Said plan is on file in the Department of Planning, Building and Code Enforcement and is available for inspection by anyone interested herein, and said development plan is incorporated herein by this reference, the same as if it were fully set forth herein; and

WHEREAS, said hearing was conducted in all respects as required by the San José Municipal Code and the rules of this Planning Commission;

NOW, THEREFORE, BE IT RESOLVED BY THE PLANNING COMMISSION OF THE CITY OF SAN JOSE AS FOLLOWS:

After considering evidence presented at the Public Hearing, the Planning Commission finds that the following are the relevant facts regarding this proposed project:

1. This site has a designation of General Commercial on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project is located in the A (PD) Planned Development Zoning District. The Planned Development Zoning (PDC87-004) allows uses under the Commercial Pedestrian (CP) Zoning District.
3. The subject site (175 S. Capitol Avenue) is located in a multi-tenant shopping center that consists of a variety of commercial uses, including retail, personal services, offices and another restaurant.
4. The subject site is surrounded by single-family detached residences and commercial uses to the north, Capitol Avenue to the east, commercial and residential uses to the south and single-family attached residences to the west.
5. The applicant filed a Planned Development Permit Amendment to allow for late night use operation between 12:00 midnight and 3:00 a.m. on Thursdays, Fridays and Saturdays.
6. The restaurant is approximately 2,400 square feet, and the project does not propose any new construction.
7. The project was found to be exempt from environmental review under Section 15301 of the CEQA Guidelines, which exempts projects with existing facilities involving little or no expansion of an existing use. The project proposes no addition to the existing building, nor an increase in seating capacity.
8. The proposed project will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Section 711.2 of the California Department of Fish and Game Code.
9. The applicant clarified that the proposed business is a sit-down restaurant and not a bar or fast food restaurant, and that the additional 3 hours would be cost effective for the restaurant

business. The applicant has stated that he intends to serve late night diners.

10. The Evaluation of 24-Hour Use Policy (adopted by City Council on November 30, 1984) states that physical separation of incompatible uses is the best means to avoid potential problems. Twenty-four hour uses should generally not be located within 300 feet (measured from the building entrance and designated parking area to the residential property line) from any property residentially zoned, planned or used. Location of other buildings or physical features can help mitigate the separation requirement.
11. The restaurant entrance is located approximately 50 feet from the residentially zoned property located behind the commercial center; however the existing building and attached masonry wall provide separation and noise attenuation between the commercial and residential uses.
12. The proposed late night hours at the existing public eating establishment would provide neighborhood-serving use and support small, local businesses.
13. A memorandum dated November 13, 2003 from the San José Police Department indicated that they were not in support of the request to remain open until 3:00 a.m., and were neither opposed nor supportive of operations until 2:00 a.m. The site is located in San José Beat M5. The reported crime statistics for the police beat in which the restaurant is located are over the 20% crime index indicating a crime rate more than 20% above the citywide average.
14. While the project site is in an area that is significantly impacted with criminal activity, police statistics indicate the criminal activity is not necessarily associated with this particular restaurant.
15. On June 9, 2004, the Police Department reissued a memorandum regarding the 24-hour uses at the restaurant. Because of the East Valley/680 Communities SNI residents' support of the 3:00 a.m. closing time, the Police Department does not oppose the extended hours application.
16. On November 25, 2003, staff received comments from the East Valley/680 Communities Strong Neighborhood Initiative (SNI) residents that they do not support businesses that sell alcohol during late night hours.
17. On March 18, 2004, the applicant presented the proposed extended hours to the East Valley/680 Communities SNI Neighborhood Advisory Committee (NAC). The NAC supported the applicant's request for late night hours on the condition that no alcohol is served or live entertainment is provided during the extended hours.
18. The Planned Development Permit Amendment does not limit the sale of alcohol at a bona fide eating establishment because this is under the purview of the California State Alcoholic Beverage Control (ABC) regulations. Although the restaurant currently has an ABC license to serve alcohol until midnight and the applicant has indicated that no alcohol would be served during the extended hours, this Permit does not limit alcohol sales in conjunction with the restaurant to end at midnight in recognition of ABC regulations.

19. This Permit includes a condition requiring on-site security during the proposed extended hours of operation.
20. The applicant has indicated that restaurant staff will also conduct a walk-through of the business parking lot and adjacent residential street to help ensure that customers do not leave behind litter on or around the project site.
21. This Permit includes a condition requiring a Compliance Review in (1) one year.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project will be consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed project is substantially in conformance with the *Evaluation of 24-Hour Use Policy* in that the building's orientation and attached masonry wall provides an adequate buffer for residents and an on-site security guard will be provided to address potential nuisance issues.
3. The project will not have any adverse effects on public health, safety or welfare and will not be materially injurious to adjacent properties or improvements.
4. The proposed project complies with all applicable provisions of the Zoning Ordinance.
5. The proposed project is in compliance with the California Environmental Quality Act.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not
 - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; and will
 - b. Impair the utility or value of property of other persons located in the vicinity of the site; and will
 - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and

3. The proposed site is adequately served:
 - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
 - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Planned Development Permit Amendment to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth is hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon the facts as stated to the Commission and enumerated above and except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

CONDITIONS PRECEDENT

This Planned Development Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and a Certificate of Permit has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be *signed, notarized, and returned* to the Department of Planning, Building and Code Enforcement within **60 days** from the date of issuance of the resolution granting the permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.* Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the acceptance form.

CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Sewage Treatment Demand.** Chapter 15.12 of Title 15 of the San José Municipal Code requires that all land development approvals and applications for such approvals in the City of San José shall provide notice to the applicant for, or recipient of, such approval that no vested right to a Building Permit shall accrue as the result of the granting of such approval when and if the City Manager makes a determination that the cumulative sewage treatment demand of the San José-Santa Clara Water Pollution Control Plant represented by approved land uses in the area served by said Plant will cause the total sewage treatment demand to meet or exceed the capacity of San José-Santa Clara Water Pollution Control Plant to treat such sewage adequately and within the discharge standards imposed on the City by the State of California Regional Water Quality Control Board for the San Francisco Bay Region.

Substantive conditions designed to decrease sanitary sewage associated with any land use approval may be imposed by the approval authority.

2. **Conformance with Plans.** Construction and development shall conform to the approved development plans entitled, "Capitol Commercial Center," dated June 30, 2004, on file with the Department of Planning, Building and Code Enforcement and Building and to the San José Building Code (San José Municipal Code, Title 17, Chapter 17.04).
3. **Hours of Operation.** The subject site shall be limited to operation between the hours of 6:00 a.m. to 12:00 midnight, Sunday through Wednesday (inclusive), and between the hours of 6:00 a.m. to 3:00 a.m., Thursday, Friday and Saturday. All other tenants within the center are limited to hours of operation between 6:00 a.m. and 12:00 midnight unless a Planned Development Permit is approved for 24-hour operation or operation after midnight.
4. **On-Site Security.** The project shall provide a minimum of one, on-site, uniformed security staff from 11:30 p.m. to 3:30 a.m., Thursday, Friday and Saturday.
5. **Conformance with Municipal Code.** No part of this approval shall be construed to permit a violation of any part of the San José Municipal Code or any other applicable law.
6. **Previous Permit Conditions.** These conditions are in addition to the conditions of the previously approved Planned Development Permit, File No. PD87-072, which are unchanged and in full force effect.

CONDITIONS SUBSEQUENT

1. **Permit Expiration.** This Planned Development Permit Amendment shall automatically expire in two years from and after the date of adoption of the Resolution by the Planning Commission, granting this Permit, if within such two-year period, the proposed use of this site or the construction of buildings has not commenced, pursuant to and in accordance with the provisions of this Planned Development Permit Amendment. The date of adoption is the date the Resolution granting this Planned Development Permit Amendment is approved by the Planning Commission.
2. **Revocation, Suspension, Modification.** This Planned Development Permit Amendment may be revoked, suspended or modified by the Planning Commission at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 2, Chapter 20.100, Title 20 of the San José Municipal Code it finds:
 - a. A violation of any conditions of the Planned Development Permit Amendment was not abated, corrected or rectified within the time specified on the notice of violation; or
 - b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or

c. The use as presently conducted creates a nuisance.

3. **Compliance Review.** A Compliance Review is required one (1) year from the date of approval of this Permit.

APPROVED and issued this 25th day of August, 2004, by the following vote:

AYES: DHILLON, CAMPOS, JAMES, PHAM, ZITO

NOES: LEVY

ABSENT: PLATTEN

DISQUALIFIED: NONE

Chairperson

ATTEST:
Stephen M. Haase, Secretary

Deputy

DC:ll